(3)

No. 87-132

Supreme Court, U.S.
FILED
SEP 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

PENNSYLVANIA DENTAL ASSOCIATION; DELAWARE VALLEY DENTAL SOCIETY; ERIE COUNTY DENTAL ASSOCIATION, INC.; HARRISBURG AREA DENTAL SOCIETY; LUZERNE COUNTY DENTAL SOCIETY; MONTGOMERY-BUCKS DENTAL SOCIETY; ODONTOLOGICAL SOCIETY OF WESTERN PENNSYLVANIA; SCRANTON DISTRICT DENTAL SOCIETY; YORK COUNTY DENTAL SOCIETY; FIFTH DISTRICT DENTAL SOCIETY; DENNIS W. KING, D.D.S.; CHARLES M. LUDWIG, D.D.S.; THEODORE R. PALADINO, D.D.S.; THOMAS L. PERKINS, D.M.D.; and KAY F. THOMPSON, D.D.S.,

Petitioners

v.

MEDICAL SERVICE ASSOCIATION OF PENNSYLVANIA, d/b/a PENNSYLVANIA BLUE SHIELD,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONERS

Of Counsel

Barry E. Carter
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Charles F. Scarlata
1550 Koppers Building
Pittsburgh, Pennsylvania 15219
(412) 765-2855

Counsel for Petitioner Theodore R. Paladino, D.D.S.

Thomas A. Beckley*
John G. Milakovic

Beckley & Madden
212 North Third Street
Post Office Box 11998
Harrisburg, PA 17108
(717) 233-7691

Counsel for Petitioners

**Counsel of Record*

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

13pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF FOR PETITIONERS	1
A. The Third Circuit *Sua Sponte* and Incorrectly Reversed Summary Judgment as to Admittedly Legitimate Petitioning Activities	3
B. The Third Circuit Improperly Assumed the Alleged Anticompetitive Effect under the Rule of Reason	4
C. The Dentists Are Being and Have Been Denied Due Process	6
1. Injury	7
2. Petitioners Not Mentioned	9
3. Audits	10

TABLE OF AUTHORITIES

Cases: Page

Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986). 3 n.1, 8-9 & n.5

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc, 365 U.S. 127 (1961)..... 3-4

Federal Trade Commission v. Indiana Federation of Dentists, 106 S.Ct. 2009 (1986)..... 2 n.1, 4, 5

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986)..... 2 n.1, 4

NAACP v. Button, 371 U.S. 415 (1963)..... 10

Southern Cal. Retail Clerks Union & Food Employees Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262 (9th Cir. 1984)..... 9 n.5

Since fundamental first amendment rights to petition the government are at issue, Blue Shield's Opposition Brief is notable for its near silence and evasions. Similarly, its Opposition Brief is marked by mischaracterizations on other issues.

The Dentists demonstrated that the Third Circuit incorrectly has hamstrung well-established law by ruling *sua sponte* that admittedly legitimate petitioning is somehow subject to Sherman Act scrutiny if arguably anticompetitive conduct is present. (Pet. Argument 1.) Moreover, the Third Circuit, in reversing the District Court's rule of reason findings, has rejected traditional rule of reason analysis by making unreasonable inferences of a completely hypothetical anticompetitive effect. (Pet. Argument 2.) Finally, the Third Circuit has contradicted the law of the case, disregarded the District Court's preclusive orders, and ignored controlling law and material facts to reverse summary judgment in a way which has denied and will continue to deny the Dentists due process of law. (Pet. Argument 3.)

In its Opposition Brief, Blue Shield fails to address the legal issues squarely presented by this case. Instead, it consistently mischaracterizes the holdings of the Third Circuit, the procedural history, and the state of the record, in an effort to assert that the Court's errors were not legal, but "fact-bound." (B.S.Br. at 12, 19, 21.) For example, Blue Shield says that the Third Circuit did not hold that the legitimate petitioning could somehow become illegal, but rather that the Court "merely separated acts which may be factually immune from those which are not." (B.S.Br. at 20.) But Blue Shield then fails to offer any explanation whatsoever for the Third Circuit's decision to reverse summary judgment in its entirety and order a trial on even the admittedly immune petitioning.

Blue Shield also asserts that the Third Circuit did not simply assume the anticompetitive effects alleged by Blue Shield, but rather that the "anticompetitive effects

. . . are clearly established in the record." (B.S.Br. at 15.) But Blue Shield then fails to point to one single piece of evidence showing that the alleged anticompetitive effect actually exists.

Finally, in a *tour de force* of the type of selective memory espoused by Orwell's party members in *1984*, Blue Shield asserts that it never meant to establish the law of the case (B.S.Br. at 22-23), that the preclusive pretrial order of the District Court was somehow rescinded (B.S.Br. at 5 and 25 n.19), and that contradictory affidavits raise genuine issues because its affiants did not mean what they swore to the first time around (B.S.Br. at 23-24.).

While creative, these efforts at obfuscation are belied by the undisputed facts. Certiorari should be granted to address the real legal issues.[1]

---

1. We have not exhausted the creativity of the Opposition Brief. On Page 5 thereof, Blue Shield asserts that summary judgment was based primarily on the Seventh Circuit's erroneous holding in *Federal Trade Commission v. Indiana Federation of Dentists*, 745 F.2d 1124 (7th Cir. 1984), *rev'd*, 106 S.Ct. 2009 (1986). From that assertion, Blue Shield then argues that because this Court reversed in *Indiana Federation*, the Third Circuit correctly reversed in this case. That position ignores the fact that, while mentioning *Indiana Federation*, the District Court actually grounded its decision on traditional rule of reason analysis and found no evidence in the record of the asserted anticompetitive effects. (*See*, for example, Pet.App. A-47¶'s 1 & 2; A-48 ¶3; A-52; A-55; A-56; A-58-59.)

At page 6, Blue Shield states that all the courts below have agreed factually on the mechanics of its "UCR" system, and that they have all recognized that there may be a discount to subscribers in some cases. While true, this leaves the legal question of whether a *reasonable* inference may be drawn from this fact alone that a "reduced" percentage of participating dentists has caused Blue Shield subscribers to lose the benefit of these isolated discounts. The District Court directly confronted this legal question and, relying on this Court's reasoning in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), held that the inference was unreasonable in light of the other undisputed facts. (Pet.App. A-47-50; A-56 & n.11; A-59; A-61-64.) The Court of

A. The Third Circuit *Sua Sponte* and Incorrectly Reversed Summary Judgment as to Admittedly Legitimate Petitioning Activities.

The Third Circuit's unsolicited ruling, which established quantitative standards for deciding whether legitimate petitioning enjoys immunity, directly contravenes this Court's holdings since *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). (*See* Pet. at 10-13.) Blue Shield does not even suggest that this unprecedented ruling is consistent with the case law of this Court. (*See* B.S.Br. at 18-21.)

Instead, Blue Shield implies that the Third Circuit did not actually reverse the District Court's grant of summary judgment as to the Dentists' direct petitioning. (B.S.Br. at 20-21.) Never mind that the Third Circuit opinion squarely addresses and rejects the immunity defense as to *all* activities, including direct petitioning (Pet.App. A-16), and never mind that summary judgment clearly was reversed in its entirety (Pet.App. A-18-19).

Not even Blue Shield can maintain this story. At page 26 of its Opposition Brief, Blue Shield grudgingly acknowledges that the Third Circuit "perfunctorily" rejected the immunity defense for *all* of the Dentists' activities — even those which Blue Shield did not contest because they constituted legitimate petitioning. In its sole effort to confront the Third Circuit's obvious error, Blue Shield explains that the Court of Appeals holding "is not surprising . . . since the district court had

---

Appeals apparently believes that the limits of reason do not apply to inferences of anticompetitive effect. (Pet.App. A-5.)

Further mischaracterization is Blue Shield's assertion that this Court's opinion in *Celotex Corp. v. Cartett*, 106 S.Ct. 2548 (1986) stands for the proposition that a party opposing summary judgment need not show that it is able to produce admissible evidence *even at trial*, in order to avoid summary judgment. (B.S.Br. at 21.) That result, of course, would render Rule 56 an absurdity and would be unwarranted under *Celotex*. (*See* this Reply Br., at Arg. C(1).)

erroneously viewed all of the Dentists' activities from the inception of their departicipation boycott as protected by *Noerr*." (B.S.Br. at 26.) Assuming *arguendo* that the District Court construed *Noerr* too broadly, however, this is no logical or legal basis for the Third Circuit to err in the opposite direction and disregard *Noerr*.

The Dentists currently are engaged in legislative, administrative, and judicial proceedings on a number of issues which affect dentists, patients, and Blue Shield. (Pet. at 13.) Absent certiorari, the chilling effect on the associational and petitioning rights of 6,500 Pennsylvania dentists is obvious. The Third Circuit should be reversed immediately on this extremely significant issue.

B. The Third Circuit Improperly Assumed the Alleged Anticompetitive Effect Under the Rule of Reason.

By unreasonably inferring an alleged anticompetitive effect nowhere established in the record, the Third Circuit has overruled 70 years of this Court's precedents. (*See* Pet. at 14-16.) Although Blue Shield might prefer it otherwise, the decision in *Federal Trade Commission v. Indiana Federation of Dentists*, 106 S.Ct. 2009 (1986), in no way deviates from these precedents. In fact, the *Indiana Federation* Court found a violation only after making the critical evidentiary finding that the record showed "actual, sustained adverse effects on competition in those areas where IFD dentists predominated . . . ." 106 S.Ct. at 2019. Here, the record shows no such effect (*see, e.g.*, Pet.App. A-47), and the Third Circuit unreasonably assumed it to exist (Pet.App. A-11).

Instead of addressing the real legal issue of whether the Third Circuit's assumption was reasonable, *see generally, Matsushita*, 106 S.Ct. at 1356, Blue Shield boldly asserts that the "anticompetitive effects of the Dentists' boycott are clearly established in the record." (B.S.Br. at

15.) In this regard, Blue Shield claims that "a reduced percentage" of participating dentists has caused some consumers (its patients/subscribers) to lose the benefit of discount pricing resulting from Blue Shield's ban on balance billing. (B.S.Br. at 14 & n.9; 16-18.) One searches in vain for record support.

Even if one found the participation resolutions of 1974 and 1975 responsible for at least some of the approximately 15% "reduction" in the percentage of participating dentists, this should not end the inquiry. Other undisputed material facts strongly suggest that the illusory "percentage reduction" had absolutely no effect on consumers. *Cf. Indiana Federation*, 106 S.Ct. at 2018 (restraint impeding consumer choice violates rule of reason). These undisputed facts show that, regardless of the contrived "percentage reduction" cited by Blue Shield, *there are now more participating dentists than ever before to serve Blue Shield subscribers.* (J.A. 9178-90.) This makes it completely implausible simply to assume that patients have found themselves unable to obtain the discount when desired.[2] In fact, despite Blue Shield's allegations of a statewide conspiracy lasting twelve years, *Blue Shield has not been able to produce one single patient stating an inability to obtain the infrequent discount*![3]

---

2. Indeed, even if the patients/subscribers went to non-participating dentists, the so-called "discount" is simply not a factor in most cases, because it is non-existent! (B.S.Br. at 6.)

3. Blue Shield openly admitted in discovery that it did not know of any instance in which a Blue Shield patient could not find a participating dentist. Terrence E. Bowling, a Blue Shield employee "responsible for maintaining an optimal number of participating doctors . . ." (J.A. 1445), testified that Blue Shield's theory is completely hypothetical:

> Q. How do you know that . . . significant numbers of subscribers cannot readily avail themselves of participating dentists?
>
> A. Because our records reflect that there are not many participating dentists in those areas. We draw the assumption that

Other undisputed facts in the record *affirmatively* suggest that the assumption is unreasonable — patients are able easily to obtain the discount. Doctor Henry J. Zielinski, of Luzerne County, and Doctor Charles M. Ludwig, of Harrisburg — both non-participating dentists — testified that their Blue Shield patients went to other dentists to obtain the infrequent UCR discount. (J.A. 248-49 and 2399-2401.) Similarly, dentists have testified that they participate because if they do not they will lose their patients to participating dentists who abide by the ban on balance billing. (J.A. 133-34; 303-06; 779-80; 2423-28; and 2479-84.)

In sum, the Third Circuit simply assumed that the alleged anticompetitive effect occurred. That unsupported assumption is unreasonable in light of the undisputed record as a whole. Certiorari should be granted to define the inferences permissible under the rule of reason.

C. The Dentists Are Being and Have Been Denied Due Process.

Blue Shield takes extreme liberties with the procedural history, factual record, and holdings of this Court, in order to say that its allegations of injury in this private antitrust action — lost sales resulting from insufficient participating dentists — are not based upon hypothetical theories and "sham" evidence which were improperly considered by the Third Circuit. (*Compare* Pet.Arg. 3,

---

NOTES *(Continued)*

people who live in these areas wouldn't find many participating dentists.

Q. Is there any other basis for your conclusion that the subscribers in those areas cannot readily avail themselves of participating dentists?

A. No.

(J.A. 1449-50.)

Points A-D. *with* B.S.Br. at 21-26.) Blue Shield's arguments regarding the Third Circuit's improper reversal on issues not even pressed on appeal, reversal as to certain Petitioners without any supporting evidence, and disregard of important constitutional defenses, are at best half-hearted and weak. (*Compare* Pet.Arg. 3, Points E-G *with* B.S.Br. at 26-27.) Nothing in the Opposition Brief negates the conclusion that the Court's actions have denied the Dentists due process and have made it impossible for the District Court to proceed logically on remand.

1. *Injury.* In the first of the two appeals in this case, Blue Shield argued vigorously that its system of participating dentists is "of no appreciable difference" to purchasers of prepaid dental programs. (J.A. 3590.)[4] This argument was based upon affidavits, proferred by Blue Shield, of purchasers of prepaid dental programs. (*Id.*)

This time out, Blue Shield wishes not only to advance the theory that purchasers care about its system of participating dentists, but that the purchasers *really* care and actually make their decisions based upon such esoteric Blue Shield concepts as "percentage level" of participation per county. To say that this theory is not inconsistent with its previous assertions, Blue Shield must "rewrite" its previous affidavits. (B.S.Br. at 10 n.7.) Despite Blue Shield's creative interpretations, however, the affidavits now "rewritten" by Blue Shield show the inconsistency very clearly. For example, the Giant Foods Store affidavit establishes that Giant purchased Blue Shield without regard to the low percentage of participating dentists in Giant's area. (J.A. 2736-37; 9178-90.)

---

4. Consistent with this argument, Blue Shield asserted that the differences between participating and non-participating dentists were illusory, because in the majority of instances Blue Shield payments equalled the full charges of dentists and it did not matter whether a dentist was participating. (J.A. 3940 ¶ 14; 3947 ¶42; 3503 ¶69.)

On the other hand, in the Boeing Vertol Company area, there is a high percentage of participating dentists (J.A. 9187) *but the company nonetheless did not deem this significant in purchasing Blue Shield* (J.A. 2714 ¶10); rather, the price of the program was deemed significant. *(Id.)*

As for Blue Shield's weak assertion that different legal issues were involved (B.S.Br. at 22-23), the Dentists can only note the obvious: The issue in both instances was, what is the significance to purchasers of dental programs of the existence of participating dentists?

The Third Circuit initially adopted an interpretation of Blue Shield's affidavits contrary to that now urged. (Pet.App. A-89 & A-92.) The law of the case was that purchasers of prepaid dental programs attached "no appreciable significance" to participating dentists. (J.A. 3590.) Now, the Third Circuit has reversed itself (Pet. App. A-12), causing Blue Shield to win and the Dentists to lose on both occasions. That is fundamentally unfair.

Worse, there is no evidence which could be considered, for purposes of summary judgment, to support the new theory. The three affiants regarding lost sales were not listed as trial witnesses and cannot testify. Although Blue Shield makes a number of arguments regarding this point, they are all legally and factually erroneous. First, Blue Shield says that the District Court somehow modified its preclusive pretrial order. (B.S.Br. at 5, and 25 n.19.) The Court did not, however, and there is no support for Blue Shield's assertion in the record. Second, Blue Shield sets forth the uncontroversial legal proposition that its evidence need not be presented at this stage in a form that would be admissible at trial (B.S.Br. at 21 ¶ (i)), citing *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). But in order to have the Court consider affidavits of witnesses who cannot testify at trial, Blue Shield is going several steps further and is really arguing that it need not show that it is able to produce admissible

evidence *even at trial* in order to preclude summary judgment. The adoption of such an argument is unwarranted under *Celotex*, and nullifies Rule 56. Unfortunately, the Third Circuit has adopted precisely this position. (Pet.App. A-13.)[5]

The Dentists arbitrarily have been denied their right as litigants to avail themselves of the procedure outlined in Fed.R.Civ. P.56, in order to avoid a lengthy and very expensive trial. This violates due process.

2. *Petitioners Not Mentioned.* The Third Circuit reversed as to all Dentists without even mentioning six Petitioners. (*See* Pet. at 27-28.) The record is particularly clear that these six did nothing violative of the Sherman Act. *(Id.)*

At page 27 of its Brief, Blue Shield cites the "evidence" it presented as to these six Petitioners. Nowhere is Thomas L. Perkins, D.M.D. mentioned in the "evidence." Beyond this, the cites almost exclusively refer to a meeting of the Odontological Society of Western Pennsylvania called for the purpose of garnering legislative support for hearings by the Pennsylvania Consumer Affairs Committee and eventually, for the passage of a bill amending the act governing Blue Shield. (J.A. 309; 1482-90; 2597-2601; 8289; 8291-92.) This meeting, which was undoubtedly immune, is apparently the sole factual basis for Blue Shield's suit against the Odontological Society, Kay F. Thompson, D.D.S., and Theodore R. Paladino, D.D.S. While essentially admitting that the Dentists' petitioning of the legislature was a legally protected activity (B.S.Br. at 20-21 & 26), Blue

---

5. Blue Shield's real argument is a serious mischaracterization of *Celotex*, where this Court merely acknowledged that under Rule 56(c) there are various enumerated methods of showing a triable issue. 106 S.Ct. at 2554. At least one other Circuit has recognized the fallacy of defeating summary judgment on the basis of evidence which cannot be produced at trial. *See Southern Cal. Retail Clerks Union & Food Employees Joint Pension Trust Fund v. Bjorklund*, 728 F.2d 1262 (9th Cir. 1984).

Shield has inconsistently continued to cite this meeting as "evidence" against these Petitioners.[6]

Certiorari should be granted on this point, because the only evidence cited against these Petitioners relates to protected activities. The Third Circuit could not even bring itself to mention these Petitioners, cavalierly sending them back to face a prolonged and expensive antitrust trial. This arbitrarily and effectively denied them of the procedures available to all other litigants for securing summary judgment, thereby denying due process and chilling the exercise of constitutionally-protected rights.

3. *Audits.* The only material evidence regarding the alleged "concerted resistance" to Blue Shield's audits is the legal opinion letters which are circulated upon request to association members confronted by an audit. (Pet.App. A-7.) These two form letters are in the record, and it is obvious that they do not advise dentists not to cooperate in audits. (J.A. 8568-70; 9139-41.) Rather, the circulation of the letters is nothing more than the protected associational activity of giving and seeking legal advice. *See NAACP v. Button*, 371 U.S. 415 (1963).

Respectfully submitted,
Of Counsel

Barry E. Carter
600 New Jersey Avenue, N.W.
Washington, D.C. 20001

Charles F. Scarlata
1550 Koppers Building
Pittsburgh, Pennsylvania 15219
(412) 765-2855

Counsel for Petitioner
Theodore R. Paladino, D.D.S.

Thomas A. Beckley*
John G. Milakovic

Beckley & Madden
212 North Third Street
Post Office Box 11998
Harrisburg, PA 17108
(717) 233-7691

Counsel for Petitioners

**Counsel of Record*

---

6. The cites which do not refer to the legislative initiative meeting refer to legal advice given by Petitioner Paladino (who is a lawyer as well as an oral surgeon) to his clients (J.A. 1475-80), or to associational activity of Delaware Valley Dental Society and Dennis W. King, D.D.S., geared toward petitioning the Pennsylvania Insurance Department (J.A. 8401-04; 8413-14; 8527-29).